Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 79-382

JOSEPH ROBERT COTTONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JOSEPH ROBERT COTTONE, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals, Fifth Circuit, entered on 19 June 1979, Rehearing denied 6 August 1979. (Said Judgment and Order are incorporated as Appendix "A").

The United States District Court, Middle District of Florida, Tampa Division, entered a Judgment on 4 August 1978 convicting Petitioner of Two Counts of Making a False Statement to a Federally Insured Bank in violation of Title 18, Section 1014, and Title 18, Section 2, U.S.C., and sentencing Petitioner to a term of 18 months on each Count with the sentences to run concurrently. (Said Judgment and Commitment Order is incorporated as Appendix "B").

The United States Court of Appeals, Fifth Circuit,

rendered its decision and Opinion wherein it affirmed the Judgment of the lower Court. This was in an unpublished opinion which is incorporated as Appendix "A".

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1254(1), U.S.C., and Rule 19(1)(b), Supreme Court Rules.

QUESTIONS PRESENTED

1. WHETHER A FALSE ORAL STATEMENT TO AN OFFICER OF A FEDERALLY INSURED BANK MADE IN ONE JUDICIAL DISTRICT IS A COMPLETED OFFENSE OR IS THE OFFICERS RETURN TO ANOTHER JUDICIAL DISTRICT AND COMPLETION OF THE LOAN MAKE THE OFFENSE A CONTINUING ONE.
2. WHETHER THE EXECUTION OF A LOAN DOCUMENT INCORPORATING OTHER DOCUMENTS NOT EXECUTED BY PETITIONER BUT WHICH CONTAIN FALSE STATEMENTS ARE IMPUTED AND ARE SUFFICIENT TO SUSTAIN A CONVICTION FOR AIDING AND ABETTING.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents a question concerning the application

and construction of the 6th Amendment to the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed***

and Title 18, U.S.C.:

> Section 2.
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
>
> Section 1014. Whoever knowingly makes any false statement *** for the purpose of influencing in any way the action of *** any bank the deposits of which are insured by The Federal Deposit Insurance Corporation***.

STATEMENT

The Indictment in this cause (Appendix "C") contained Six Counts. The trial Court granted a Judgment of Acquittal as to Counts 2, 3, 4 and 5. Petitioner and his son, Charles, were charged in Count One with making a false statement. However, this Count alleged only that Charles Cottone made the statement in a Security Agreement (Appendix "D") that certain cattle were free of all other liens. In fact, the evidence showed that the cattle were the subject of a prior lien to another bank. Petitioner did not execute the Security Agreement but he did endorse the Promissory Note

(Appendix "E"), which was secured by the Security Agreement. There was no evidence that Petitioner read the Security Agreement or even knew its contents and there was no evidence that he was aware of the prior lien to another bank.

Count Six involved an oral statement that was to the effect that the proceeds of a loan were to be used to purchase feed for cattle. This statment was made in the Northern District of Florida. The recipient of the statement returned to his office in the Middle District of Florida where the loan was approved and the loan documents mailed to the Northern District where they were signed and mailed back to the Middle District of Florida. The statement upon which this Count was predicated was not contained in the loan documents.

SUMMARY OF ARGUMENT

QUESTION 1. The false statement was oral and was made in the Northern District of Florida. The bank officer returned to his bank in the Middle District of Florida where the loan was approved. A promissory note was then mailed to Charles Cottone for signature and endorsement of Petitioner and mailed back to the bank. The false statement was not made in the loan documents and was not made while Petitioner or his son were in the Middle District. Therefore, it is Petitioner's position that the offense was completed in the Northern District of Florida and venue was improperly laid in the Middle District of Florida.

ARGUMENT

QUESTION 1.

There is no dispute about the facts involved under Count Six of the Indictment. The statement was made to an officer of the Exchange Bank of Tampa, Florida, while the officer, John G. Kuykendall was on the farm of Charles Cottone in Levy County, Florida, which is in the Northern District of Florida. The statement was never repeated by the Cottones at any other time or place. Mr. Kuykendall then returned to Tampa and, when the loan was approved, the promissory note was mailed to the Levy County Farm and sent back to Tampa by mail.

The Opinion affirming the Judgment of Conviction on Count Six stated:

> ". . . The defendants exercise an excess in literalism by asserting that for venue purposes the crime was completed upon the initial statement to Kuykendall without reference to the continuing subsequent events. The purpose of their discussion with Kuykendall was to initiate a loan application to obtain funds. Thus, the activities involved in completing the application, including the transmission of the application forms by mail between the Bank and the farm, are integrally associated with the commission of the crime."

Petitioner's argument is that the Court of Appeals decision has misconstrued the elements of the offense and, therefore, conflicts with other Federal Appellate Court decisions.

In a Section 1014 prosecution, the offense is complete when the statement is made. As the Court stated in *United States v. Simmons,* C.C.A. 5th, 1974, 503 F.2d 831, in discussing the burden of proof imposed upon the prosecution:

"In order to meet its burden of proof in any prosecution pursuant to Title 18, U.S.C., Sec. 1014, the government must show (1) that a statement has been supplied by the Defendant to a specified lending institution which is capable of influencing the institution's decision to loan funds, and (2) that the statement is knowingly false."

The fact that the bank does not rely upon the statement or even not make the loan is not relevant or material and cannot be the basis of a defense.

There are a number of cases that should be considered in reviewing Petitioner's argument on this issue. *Reass v. United States,* C.C.A. 4th, 1938, involved a prosecution for a false statement for the purpose of influencing the action of a Federal Home Land Bank under the predecessor statute to Section 1014. Defendant was indicted in the Northern District of West Virginia. The evidence showed that the alleged false statements were composed in Wheeling, West Virginia and delivered for filing with the Federal Home Land Bank in Pittsburg, Pennsylvania. The lower Court overruled all objections and motions as to improper venue in West Virginia upon the theory that the offenses began in one district (West Virginia) and completed in another, and thus fell within the applicable statute which provided that a crime begun in one district and completed in another shall be deemed to have been committed in either. After discussing various crimes which can occur in multi-districts, the Court then stated:

"On the other hand, a crime may lack continuity of performance and may consist of a single act which occurs at one time and at one place in which only it may be tried, although preparations for its commission may take place elsewhere. Such are offenses which involve the filing of formal documents, such as certificates or reports at a designated office."

The Court then held:

"The case at bar belongs, in our opinion, in the latter class. The statute on which the indictment is based was passed to protect the Federal Home Loan Banks from fraudulent attempts to secure favorable action on applications for loans and like matters. The gist of the offense is the attempt to influence the corporation, as was held in regard to the companion section 8(a) of the Home Owners' Loan Act, U.S.C.A. Sec. 1467(a); United States v. Kreidler, D.C. 11 F.Supp. 402; Kay v. United States, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed. 607, and communication of the false statements to the corporation constitutes the very essence of the crime. It is in this sense that the statute condemns the making of a false statement for the purpose of influencing the bank.[4] The mere assembling of the material and its arrangement in a written composition containing the misrepresentations of fact can have no effect, and it is only when they are communicated to the lending bank that the crime takes place. It follows that the acts performed by the defendant in Wheeling, although prepatory to the commission of the crime, were no part of the crime itself. That took place entirely in Pittsburg where the writing previously prepared was presented to the bank."

In its footnote, the Court said:

"An accepted definition of the word 'make' in the Century Dictionary is to put forth; give out; deliver; as to make a speech."

United States v. Miller, C.C.A. 2nd, 246 F.2d 486, involved making false statements in a matter within the jurisdiction of the United States Treasury Department. Each count involved cashing of savings bonds and a letter written for the purpose of convincing the Treasury Department that the bonds were properly cashed. The letters containing the false statements were mailed in New York City to Washing-

ton, D. C. and Chicago. In reviewing the venue question, the Court quoted from 18 U.S.C.A. Section 3237, which provided:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

The Court then rejected the claim that venue was improper and, in so doing, ruled that because of the mailing, the offense was of a multi-district nature.

Although based on a mailing situation, the decision in *Travis v. United States,* 1961, 364 U.S. 631, 81 S.Ct. 358, is helpful in evaluating the instant cause. Travis was prosecuted in Colorado for making a false non-Communist Affidavit which was prepared in Denver and mailed to Washington, D. C. The government relied upon the continuing offense statute to justify venue in Colorado. This Court first noted:

> "Where various duties are imposed, some to be performed at a distant place, others at home, the Court has allowed the prosecution to fix the former as the venue of trial. . . .
>
> Where Congress is not explicit, 'the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" (emphasis by the Court).

The Court then pointed out that there is no offense until the Affidavit is filed with the government agency in Washington. In reversing the conviction for improper venue, the majority held:

> "Multiple venue in general requires crimes consisting of 'distant parts' or involving 'a continuously moving act.' United States v. Lombardo, 241 U.S. 73, 77, 36 S.Ct. 508, 509, 510, 60 L.Ed. 897. When a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place. Id., 241 U.S. at pages 76-78, 36 S.Ct. at page 509. The theory of that case was followed in United States v. Valenti, supra, where Judge Maris stated that no false statement has been made within the jurisdiction of the Board 'until the affidavit through its filing has become the basis for action by the Board.' Id., 207 F.2d at page 244.
>
> We think that is the correct view when 18 U.S.C. Section 3237, 18 U.S.C.A., is read in light of the constitutional requirements and the explicit provision of Section 9(h). The *locus* of the offense has been carefully specified; and only the single act of having a false statement at a specified place is penalized. The rationale of United States v. Lombardo, supra, a case involving a failure to file, is therefore equally applicable here. We conclude that venue lay only in the District of Columbia."

Another false statement case involving venue is *United States v. Ruehrup,* C.C.A. 7th, 1964, 333 F.2d 641, cert. den. 379 U.S. 903, 85 S.Ct. 194. Defendant prepared and mailed certain false statements in Illinois to a destination in Missouri. Defendant assailed venue in Illinois and this contention was rejected when the Court held that this was a multi-district offense, the statements were prepared and mailed in Illinois. The Court held:

"These events were the beginning of the offenses

charged *and the offenses were completed when the statements were received by the bank.*" (emphasis added).

As has been stressed in this brief, the offense in this case required two elements (1) a false statement (2) made to a bank, and the reliance upon the statement is not material. Thus, if as a condition to a loan, a bank officer requests a financial statement and a customer gives such a statement which contains a false matter, the customer can be prosecuted *even if the officer making the loan never sees the statement.*

There is no dispute that the alleged false statement was verbalized to the bank officer in Levy County, Florida, within the Northern District of Florida. Had Mr. Kuykendall never told anyone else at his bank in Tampa, Petitioner could still be prosecuted. It also must be remembered that this is not a case where the filing of an Affidavit governs venue. The crime was complete when the statement was utterred to the bank officer; nothing more was required to prove a prima facie case on behalf of the government.

As was written in *United States v. Rivera,* C.C.A. 2nd, 1968, 388 F.2d 545:

> "We start with the premise that venue requirements are an essential part of a case, and that a question of venue raises 'deep issues of public policy in the light of which legislation must be construed.' Art. III, Section 2 of the Constitution provides that criminal trials 'shall be held in the State where the said crimes shall have been committed', and this safeguard is reinforced by the Sixth Amendment provision that the criminal trial shall be before an impartial jury of the 'State and district wherein the crime shall have been committed.' Venue is important as a guaranty of the defendant's right to be tried in the vicinity of his criminal activity, and venue requirements are imposed to prevent the government from choosing a favorable tribunal or one which may be unduly inconvenient for the defendant."

Petitioner submits that this Court should issue its Writ of Certiorari and determine that the offense was completed when the oral statement was made and therefore under the 6th Amendment to the United States Constitution a prosecution could not be had in the Middle District of Florida.

SUMMARY OF ARGUMENT

QUESTION 2. Count One involved a false statement to the effect that certain cattle were free and clear of all liens. This statement was alleged to have been made by Charles Cottone. This statement was contained in a Security Agreement which was part of the documents securing a loan. Petitioner did not execute the Security Agreement but only endorsed the Promissory Note which was secured by the Security Agreement. There was no evidence adduced which showed that Petitioner was aware of any prior lien upon the livestock. It is therefore Petitioner's position that there was insufficient evidence to convict him as an aider or abettor of any criminal conduct.

ARGUMENT

QUESTION 2.

Once again there is no real dispute as to the facts which form the predicate for the false statement and support the conviction of Charles Cottone. However, the same facts do not support the conviction of Petitioner. The Indictment

alleges that Charles Cottone made the false statement. Therefore, Petitioner could be convicted only if Title 18, Section 2, U.S.C. is invoked. The basis of Petitioner's argument on this issue is that he has been convicted because he was the father of Charles and was present when the offense was committed and not for any criminal conduct. This decision is also in conflict with prior decisions of other Appellate Courts on the same basic factual situations.

There is no dispute that Petitioner was present at the time the officer of the involved Bank first met Charles Cottone and that Petitioner was involved in the discussions concerning the loan possibilities. There is also no dispute that Petitioner endorsed the Promissory Note in question but he did not execute the Security Agreement which contained the alleged false statement. There is no evidence that Petitioner had knowledge that his son had executed a Security Agreement to another bank which also pledged cattle although there is some evidence that Petitioner knew that his son had a loan at another bank. There is no evidence that Petitioner used any of the proceeds of the loan in question, that he was an owner of the cattle operation or that he was a signatory on the bank account in which the loan proceeds were deposited.

The guiding light in any Section 2 prosecution was stated by this Court in *Nye & Nissen v. United States,* 336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919 (1949), in adopting the language of *United States v. Peoni,* C.C.A. 2nd, 1938, 100 F.2d 401, that:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' "

United States v. Carengella, C.C.A. 7th, 1952, 198 F.2d

3, cert. den. 344 U.S. 881, 73 S.Ct. 179, 97 L.Ed. 682, involved a prosecution for receiving property stolen in interstate commerce. The Court summarized the facts as:

> "Hence, the only testimony in the entire record that Di Vito received 25 cases of whiskey and had same in his possession on March 2, 1951, is that he and Blandi came into Tenerelli's saloon on March 5, and that one of the two said to Tenerelli, 'Have you got the money?' and that one of the two received $500 from Tenerelli. The testimony against Blandi is the same, except that he subsequently asked Tenerelli questions as to police investigations as hereinbefore stated."

The Court then stated, in reversing the convictions of two of the defendants, that:

> "One is guilty as an aider and abettor which he consciously shares in any criminal act. Nye and Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed 919; United States v. Johnson, 319 U.S. 503, 518, 63 S.Ct. 1233, 87 L.Ed. 1546. The rule is expressed in the case of United States v. Williams, 341 U.S. 58, 64, 71 S.Ct. 595, 599, 95 L.Ed. 747, in this language: 'Aiding and abetting means to assist the perpetrator of the crime. * * * To be present at a crime is not evidence of guilt as an aider or abettor. Hicks v. United States, 150 U.S. 442, 447, 450, 14 S.Ct. 144, 145, 147, 37 L.Ed. 1137. Cf. United States v. Di Re, 332 U.S. 581, 587, 68 S.Ct. 222, 225, 92 L.Ed. 210.' "
>
> * * *
>
> "There is not a scintilla of evidence in this record that Di Vito and Blandi knew the whiskey was stolen. While mere possession of recently stolen property warrants the inference of guilty knowledge unless a satisfactory explanation of possession is made consistent with innocence, such an inference cannot apply here. There is no proof in the record that Di Vito and Blandi ever had any actual or constructive possession of the whiskey so

that the inference might be effective against them. Surely the aiding and abetting statute does not give rise to the inference of knowledge on the part of Di Vito and Blandi that the whiskey was stolen. There is nothing in the record to show possession by Carengella on March 2, 1951, was also possession by Di Vito and Blandi. The paying of $500 by Tenerelli to Di Vito and Blandi three days after Carengella parted with the possession of the whiskey cannot be related back to show possession on March 2, by Di Vito or Blandi and that they had the guilty knowledge which the statute makes a necessary element of the crime."

A similar issue was involved in *United States v. Kelton,* C.C.A. 8th, 1971, 446 F.2d 669. The Court recited the applicable facts as:

"On July 29, 1970, at 1:55 p.m. the Empire State Bank was robbed by three armed youths. These youths were later identified and arrested and subsequently admitted the robbery. All three testified at trial, admitting their criminal conduct, but stating that they were instructed and counseled by several other men. The record shows that the three boys were contacted on the morning of the robbery by two men, identified by the government as Earl Thomas Cole and Darris White. They were driven to the apartment of Milton Terry Kelton (hereinafter called Terry), the twin brother of the defendant. After their arrival one of the boys left with Terry and Cole to steal a car to use in the robbery. The others waited in the living room. There was testimony that at this time the defendant Jerry Kelton was present in the living room and was observed handling a gun. Thereafter everyone present with the exception of defendant, moved from the living room into the bedroom. At this time the three boys met with Cole, White, Terry, Kelton and an unidentified man and planned the robbery. Terry provided them with guns during this meeting. After the plans were laid, the boys were driven to the bank and the robbery was committed. In making their get-away, the boys used one vehicle and threw the stolen bank money into another which was driven away by an unidentified man."

The Court then stated:

"... Nothing in the testimony indicated that Jerry had knowledge of the use for which the gun was intended."

The Court then reversed Jerry's conviction and, in so doing, said:

"The crime of aiding and abetting is one requiring 'specific intent' or as Judge L. Hand once described it 'purposive attitude.' United States v. Peoni, 100 F.2d 401, 402 (2 Cir. 1938). Mere association, as opposed to participation is not sufficient to establish guilt. Baker v. United States, 395 F.2d 368 (8 Cir. 1968); Ramirez v. United States, 363 F.2d 33, 34 (9 Cir. 1966). Nor is mere presence at the scene of a crime alone sufficient to sustain the burden of proof the government bears. United States v. Williams, 341 U.S. 58, 64, n. 4, 71 S.Ct. 595, 95 L.Ed. 747 (1951); Hicks v. United States, 150 U.S. 442, 450, 14 S.Ct. 144, 37 L.Ed. 1137 (1898); Johnson v. United States, 195 F.2d 673 (8 Cir. 1952). Presence must be accompanied by a culpable purpose before it can be equated with aiding and abetting. There is no evidence of such purpose shown here. As explained by the Court of Appeals for the District of Columbia in Bailey v. United States, 135 U.S.App.D.C. 95, 416 F.2d 1110, 1113-1114 (1969):

'Presence is * * * equated to aiding and abetting when it is shown that it designedly encourages the perpetrator facilitates the unlawful deed — as when the accused acts as a look out — or where it stimulates others to render assistance to the criminal act. But presence without these or similar attributes is insufficient to identify the accused as a party to the criminality.'

The necessity for proving facts other than presence has been explained as 'an essential safeguard against the ever present danger of *assuming the complicity* of all in attendance whenever group activity is involved*** The courts have the responsibility to make sure that mere speculation is not permitted to substitute for proof in such cases." (Emphasis ours). United States v. Barber, 429 F.2d 1394, 1397 (3 Cir. 1970).

A very similar prosecution was reviewed in *Snyder v. United States,* C.C.A. 8th, 1971, 448 F.2d 716. Two brothers named Snyder were prosecuted for having aided, abetted, counseled and induced a bank president to embezzle and misapply bank funds and make a false book entry. The bank president was also a business advisor who assisted a partnership in its efforts to purchase a nightclub. The bank president issued a number of cashiers checks for the purchase but did not receive funds with which to pay for these checks. Certain of the checks were covered by a promissory note signed by the Snyders and some were covered by fraudulent notes. The Snyders' conviction was reversed. After reviewing the general law, the Court determined:

"The evidence introduced by the Government on the issue of the defendants' intent does not meet the above standard. Viewing the evidence in the light most favorable to the verdict, it is apparent that there is no direct evidence that the Snyders had the requisite knowledge and intent to defraud the bank and the circumstantial evidence here is not sufficient to support a conviction. The Snyders had previously worked for McDaniel and the bank, had taken trips paid for, at least in part, by McDaniel to Mexico and Nevada in the company of about ten other persons, and were frequent visitors to McDaniel's office at the bank, but they took no part in the banking manipulations. McDaniel personally issued the cashier's checks involved in the Ranger Bar transaction, and actively encouraged the business venture. The Snyders operated under McDaniel's guidance and there is no probative evidence that they did not intend to repay any advances made by the bank under McDaniel's guidance. The most persuasive circumstance that points toward guilt is the lack of any notes or security agreements from the Snyders, except for the $5,000 note to which the Government attaches little significance.[1] The record makes clear that the business of this bank was not carried on in an orderly fashion, and that unlawful book entries were made. The bank's transactions were most informal. One example of this is the practice of allowing customers to write overdrafts. The bank would pay these and treat them as a loan; the drawer would come in later to sign a note. There was evidence that the bank's income from this amounted to $20,000.00 to $30,000.00 per year. Also at the time of these transactions the local situation in Minot had been disrupted by a flood, and a great number of people, including the defendants and bank personnel were involved in flood relief work. Under these circumstances it might not seem at all unusual for the defendants to leave all of the formalities and details to McDaniel. It must be remembered that the defendants were inexperienced in business matters and were almost totally dependent on McDaniel for advice. Their conduct might be viewed as naive and perhaps reckless but it does not appear to be criminal."

United States v. McDaniel, C.C.A. 9th, 1976, 545 F.2d 642, also involved an aiding and abetting prosecution. Mr. McDaniel had been convicted of a felony and, therefore, could not own or use firearms. His wife purchased some guns and, in 1973, the couple went to Canada on vacation and she took the guns with them for Mr. McDaniel to use in Canada without risking an American prosecution. The jury sent the Court a note during its deliberations which asked "Can an

individual aid and abet a crime without knowledge that a crime is being committed?" The Court responded by saying "Yes" and the Court of Appeals determined that this was error when it held:

> "The *mens rea* of aiding and abetting is 'guilty knowledge'. Grant v. United States, 291 F.2d 746, 749 (9th Cir. 1961). Barbara, in order to be found guilty, must at least have assisted Ulysses in the transportation of the firearms knowing that he was transporting firearms. We said recently that one acting with 'criminal intent and design to assist the perpetrators' is guilty of aiding and abetting. United States v. Lane, 514 F.2d 22, 27 (9th Cir. 1975). But see Weedin v. United States, 380 F.2d 657, 660 (9th Cir. 1967). A defendant to be an aider and abettor must know that the activity condemned by the law is actually occurring and must intend to help the perpetrator. R. Perkins, Criminal Law 645 (1969). By its answer to the jury's question, the court could have caused the jury to disregard the requisite scienter elements which the jury had to find in order to convict Barbara."

The amount of involvement necessary to sustain a Section 2 prosecution is clearly demonstrated in *United States v. Licursi,* C.C.A. 2nd, 1975, 525 F.2d 1164. The evidence showed that Licursi was a participant in the agreement to sell cocaine to an agent, he introduced the agent to the source, he gave an opinion as to the quality of the cocaine, he went to another state to attempt to consummate the transaction and he was aware that the deal was consummated. In upholding the conviction, the Court said:

> "The evidence, viewed in the light most favorable to the government, clearly demonstrates that Licursi took an active part in the consummation of Caufield's crime of selling cocaine and that he sought, by his own action, the success of the venture. At each phase of the transaction during which Agent Brzostowski expressed doubts about the deal, Licursi reassured him and coaxed him to go on. Such coaxing and reassuring, together with Licursi's initial introduction of Caufield to DiJanni and Brzostowski, demonstrates clearly a desire on Licursi's part that the crime succeed."

Applying these decisions to this cause, it is apparent that the entire case against Petitioner is predicated upon guilt by association without proof of intent or guilty knowledge on Petitioner's part and that the conviction upon Count One is erroneous.

CONCLUSION

Accordingly, probable jurisdiction should be noted in this case.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I, SELIG I. GOLDIN, hereby certify that I am a member of the Bar of the United States Supreme Court in good standing and was admitted to practice by the Court on 17 September 1973.

/s/ Selig I. Goldin
Selig I. Goldin,
Attorney At Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT 40 copies hereof have been furnished this 31st day of August 1979 to THE HONORABLE MICHAEL RODAK, JR., Clerk, United States Supreme Court, Washington, D. C., and copies to: THE HONORABLE EDWARD W. WADSWORTH, Clerk, United States Court of Appeals, Fifth Circuit, 600 Camp Street, New Orleans, Louisiana 70130; THE HONORABLE WESLEY R. THEIS, Clerk, United States District Court, Middle District of Florida, Post Office Box 3270, Tampa, Florida 33601; and to THE HONORABLE JUDY S. RICE, Assistant United States Attorney, Post Office Box 2841, Tampa, Florida 33601.

/s/ Selig I. Goldin
Attorney At Law

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5685
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES COTTONE and JOSEPH ROBERT COTTONE,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

(JUNE 19, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

Charles Cottone and his father Joseph Robert Cottone were convicted by a jury in the Middle District of Florida of making or causing to be made material false statements in each of two loan applications. Both appeal the sufficiency of the government's evidence against them and challenge the

*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al, 5 Cir. 1970, 431 F.2d 409, Part I.

court's venue over one of the offenses. We affirm.

During the time period relevant in this case, approximately one year beginning in August 1972, Charles Cottone, a 21-year-old agricultural student at the University of Florida, lived with his father, Joseph Cottone, and his mother on a cattle farm which he owned jointly with his uncle in Levy County, Florida. The elder Cottone had turned his share of the farm over to his son to help him get started in the cattle business.

On August 31, 1972, a loan officer of the Exchange National Bank of Tampa, Robert Morris, visited the Cottone farm and discussed with Charles and Joseph a possible loan to help finance Charles' cattle operation. Because the cattle had been pledged as security for a loan outstanding with another bank, the Exchange Officer denied financing at that time. He did however prepare a financial statement for Charles from information provided by the two Cottones and offered to reconsider the application when the prior liability was satisfied. The following January, after Joseph called Morris to tell him Charles' earlier loan had been paid, the defendants visited the Exchange National Bank which then approved a $50,000 loan to Charles, endorsed by Joseph. As security, Charles signed an agreement pledging as collateral "all livestock, including but not limited to, crossbred commercial beef cattle with ear tag marked Cottone, and all progeny, offspring or increase thereof, and all replacements, additions and increase thereto or otherwise acquired by them." Morris processed the loan relying on the representations that the collateral was free and clear of all prior liens and that the August financial statement was essentially the same with the exception that Charles' earlier loan was repaid. What the Cottones failed to tell Morris was that Charles had secured a different $40,000 loan with the Sun

Bank of Ocala in November 1972, for which he pledged as collateral "98 steers at 650 lbs., 198 steers at 350 lbs., 95 beefers at 500 lbs., 89 dairy-type calves, 52 Charolais calves, plus all increase or additions to this herd."

Joseph and Charles visited Morris again in April at Joseph's request and obtained a $35,000 loan, executed by Charles and endorsed by Joseph, incorporating the original security agreements as collateral. During that spring Charles also received an additional $70,000 from the Sun Bank of Ocala backed by his original security agreement with that bank.

Two months later on June 27, 1973 the Cottones requested a third loan in the amount of $15,000 from the Exchange Bank. The request was made of John Kuykendall, an Exchange Bank representative, at a time when he was on the farm inspecting collateral with the Cottones. Kuykendall was told that the money was to be used for cattle feed. Because the amount of the loan exceeded Kuykendall's lending authority, he did not give the Cottones an immediate answer but went back to the Exchange Bank to confer with Morris. They decided to grant the loan, since the Bank had already extended $85,000 to purchase and feed the cattle, and on July 2, 1973 mailed a note in the amount requested to be secured by the original collateral. Charles signed and mailed the note, endorsed by Joseph, back to the Exchange Bank on July 9. The Cottones had fallen behind in their cattle-feed payments by the end of June. The last payment was made on that account on June 22, 1973, and the last feed delivery was made on July 5. On that same day, July 5. Charles sold all his cattle. Meanwhile, the entire farm had been sold to a purchaser backed by Joseph. The sale, which was closed on July 3, was totally engineered and financed by Joseph.

The defendants were convicted by a jury for the misrepresentation that the original collateral pledged was not the subject of a prior lien and for the false statement to Kuykendall that the purpose of the third loan was to purchase cattle feed.

Defendants urge on appeal that the trial in the Middle District of Florida was improper because the crime based on the statement to Kuykendall occurred on their farm in Levy County, in the Northern District of Florida. This objection was not raised at trial until the completion of the government's rebuttal. The government contends the objection should have been made earlier and was therefore waived. Defendants respond that the venue issue was not clear until the rebuttal case had been presented. Because we conclude trial was properly conducted in the Middle District, we need not determine whether defendants' objection to venue should have been asserted at an earlier point in the trial.

Defendants are entitled to be tried in the district in which the offense was committed. U.S. Const. Amend. VI; Fed.R.Crim. P. 18. The place where the crime was committed is to be "determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703, 66 S.Ct. 1213, 1216, 90 L.Ed. 1529 (1946). The Cottones were charged with making or causing to be made a materially false statement in applying for a loan for the purpose of influencing the bank to approve the loan in violation of 18 U.S.C.A. §1014. They argue that the oral misrepresentation of the purpose of the loan made to Kuykendall on the farm in Levy County constituted the completed crime and that therefore venue could only be appropriate in the Northern District. Section 1014 however is not aimed at false statements made in a vacuum; rather, it punishes misrepresentations made

"upon any application [for a loan]." The Cottones requested a $15,000 loan through Kuykendall to whom they made a false representation of its purpose. Kuykendall had no authority to grant so large a loan and informed the Cottones that he would transmit their request to Morris in Tampa. He did, and an application form was mailed to the Cottones, which they completed and returned to the Bank, located in the Middle District. The defendants exercise an excess in literalism by asserting that for venue purposes the crime was completed upon the initial statement to Kuykendall without reference to the continuing subsequent events. The purpose of their discussion with Kuykendall was to initiate a loan application to obtain funds. Thus, the activities involved in completing the application, including the transmission of the application forms by mail between the Bank and the farm, are integrally associated with commission of the crime. *See* United States v. Camella, 487 F.2d 1223 (2d Cir. 1973); United States v. Ruehrup, 333 F.2d 641 (7th Cir.), *cert. denied,* 379 U.S. 903, 85 S.Ct. 194, 13 L.Ed.2d 177 (1964); DeRosier v. United States, 218 F.2d 420 (5th Cir.), *cert. denied,* 349 U.S. 921, 75 S.Ct. 660, 99 L.Ed. 1253 (1955); 18 U.S.C.A. §3237(a). We find no error in conducting the trial in the Middle District of Florida.

Both defendants also challenge the sufficiency of the evidence to convict them on both counts of violating 18 U.S.C.A. §1014. That statute defines as a crime a knowingly false statement made to a specified lending institution, which is capable of influencing the institution's decision to loan funds. United States v. Johnson, 585 F.2d 119 (5th Cir. 1978); United States v. Simmons, 503 F.2d 831 (5th Cir. 1974). Defendants contend that the subject of the first count, the January statement that the security pledged for the loan was free of all other liens and security

interests, was neither false nor material. Viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), shows this assertion of error lacks merit. Defendants rely on the fact that the duplicating security agreements are not identically phrased as evidence that the statement was not false. However, both contain a general inclusive statement. The Ocala statement covered "all increase or additions to the herd," and the Exchange agreement included "all replacements, additions and increase thereto, or otherwise acquired by Debtor." Even assuming the Ocala bank agreement was limited to only certain cattle on the farm, the agreement signed with the Exchange Bank expressly included "All livestock . . . not limited to" certain cattle. There is no doubt that a representation to Morris that the cattle were subject to no other liens was false. Defendants then argue that during the three-way conversation in January between Morris and the Cottones, Morris wanted assurance only that Charles' earlier outstanding loan, disclosed the previous August, had been satisfied, and that the intervening $40,000 loan with the Ocala bank could not have been of interest to him nor material to his decision to grant a $50,000 loan. However, Morris testified that his express reason for refusing the Cottones' first loan request in August was his bank's policy to reject loans on cattle operations where other banks would hold competing rights to the collateral. The conduct of the Cottones constitutes a materially false statement within the meaning of 18 U.S.C.A. §1014.

With regard to the conviction for stating a false purpose in requesting the $15,000 loan, defendants contend the evidence does not support the jury's conclusion that the statement was knowingly false when made. This element

may of course be proved indirectly by the facts and circumstances in evidence. United States v. Braverman, 522 F.2d 218 (7th Cir. 1975). We need only find that a reasonable minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendants' guilt beyond a reasonable doubt. The representation that the $15,000 was needed to purchase cattle feed was initially made on June 27. Within eight days, prior to returning the signed loan application to the bank and the loan being funded, the Cottones had sold the entire farm and all the cattle, which had been pledged as collateral. Evidence showed that negotiations for these sales had been going on for several months. These circumstances surely provided sufficient evidence to support the jury's verdict.

Joseph further asserts that his knowledge of the false statements made by his son was not adequately proven. The evidence hardly portrays him as an innocent bystander. He actively participated in negotiating the loans for his son, endorsed the notes signed by Charles contemporaneous with execution of the security agreements, accompanied the bank representatives on their collateral inventories at the farm, and ultimately handled the sale of the farm and its produce. We conclude that the jury's decision was supported by ample evidence in the record.

AFFIRMED.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5685

U. S. COURT OF APPEALS
FILED
AUG 6 1979
EDWARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES COTTONE and
JOSEPH ROBERT COTTONE,
Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

(August 6, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark

United States Circuit Judge

BEST COPY AVAILABLE

APPENDIX "B"

ited States of America vs.

United States District Court

DEFENDANT: JOSEPH ROBERT COTTONE — MIDDLE DISTRICT OF FLORIDA - TAMPA DIV.

DOCKET NO.: 78-00005-Cr-T-H

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL: In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 08 DAY 04 YE 197

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desire have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Selig I. Goldin (Name of counsel)

FILED
TAMPA, FLA.
AUG 4 1978
WESLEY R. THIES
CLERK

PLEA: [ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [XX] NOT GUILTY

FINDING & JUDGMENT: There being a [illegible] verdict of [ ] NOT GUILTY. Defendant is discharged [XX] GUILTY.

Defendant has been convicted as charged of the offense(s) of making a materially false statement in an application for a loan to a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation; in violation of Title 18, United States Code, Sections 1014 and 2 as charged in Counts 1 and 6 of the Indictment.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the cont was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendar hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eightee (18) months as to Count 1, and Eighteen (18) months as to Count 6, sentence imposed as to Count 6 shall run concurrently with sentence imposed as to Count 1, or until the defendant is otherwise discharge as provided by law.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and re

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT RECOMMEN-DATION

It is ordered that the Clerk deli
a certified copy of this Judgm
and commitment to the U.S. M
shal or other qualified officer.

20

U.S. District Judge

U.S. Magistrate

WM. TERRELL HODGES

Date August 4, 1978

APPENDIX "C"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	:	
v.	:	CASE NO. 78-5
CHARLES COTTONE and	:	CR-T-14
JOSEPH ROBERT COTTONE	:	
	:	

The Grand Jury charges that:

COUNT ONE

On or about the 23rd day of January, 1973, at Tampa, Florida, in the Middle District of Florida,

CHARLES COTTONE
and
JOSEPH ROBERT COTTONE,

knowingly did make or cause to be made a materially false statement in an application for a loan submitted by CHARLES COTTONE on said date to The Exchange National Bank of Tampa, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that CHARLES COTTONE stated and represented in said application that the security pledged for said loan was then free of all other liens and security interests when in truth and fact, as CHARLES COTTONE well

knew, said security was then pledged to the Sun Bank of Ocala, formerly the Citizen's Commercial Bank of Ocala, Ocala, Florida; in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT TWO

On or about the 23rd day of January, 1973, at Tampa, Florida, in the Middle District of Florida,

CHARLES COTTONE
and
JOSEPH ROBERT COTTONE,

knowingly did make or cause to be made a materially false statement in an application for a loan submitted by CHARLES COTTONE on said date to The Exchange National Bank of Tampa, a bank whose deposits are insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that CHARLES COTTONE stated and represented in said application that he had a total net worth of Two Hundred Eighty-Two Thousand Nine Hundred Dollars ($282,900.00) when as CHARLES COTTONE well knew, he did not in truth and fact have such net worth; in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT THREE

On or about the 10th day of April, 1973, at Tampa, Florida, in the Middle District of Florida,

CHARLES COTTONE
and
JOSEPH ROBERT COTTONE,

knowingly did make or cause to be made a materially false statement in an application for a loan submitted by CHARLES COTTONE on said date to The Exchange National Bank of Tampa, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that CHARLES COTTONE stated and represented in said aplication that the security pledged for said loan was then free of all other liens and security interests when in truth and fact as CHARLES COTTONE well knew said security was then pledged to the Sun Bank of Ocala, formerly the Citizen's Commercial Bank of Ocala, Ocala, Florida; in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT FOUR

On or about the 10th day of April, 1973, at Tampa, Florida, in the Middle District of Florida,

CHARLES COTTONE
and
JOSEPH ROBERT COTTONE,

knowingly did make or cause to be made a materially false statement in an application for a loan submitted by CHARLES COTTONE on said date to The Exchange National Bank of Tampa, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that CHARLES COTTONE stated and represented in said application that the proceeds of said loan were to be used to purchase cattle when in truth and fact as CHARLES COTTONE well knew the total proceeds of said loan were not to be so used; in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT FIVE

On or about the 17th day of July, 1973, at Tampa, Florida, in the Middle District of Florida,

CHARLES COTTONE
and
JOSEPH ROBERT COTTONE,

knowingly did make or cause to be made a materially false statement in an application for a loan submitted by CHARLE COTTONE on said date to The Exchange National Bank of Tampa, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that CHARLES COTTONE stated and represented in said application that the security pledged for said loan was then free of all other liens and security interests when in truth and fact as CHARLES COTTONE well knew said security was then pledged to the Sun Bank of Ocala, formerly the Citizen's Commercial Bank of Ocala, Ocala, Florida; in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT SIX

On or about the 17th day of July, 1973, at Tampa, Florida, in the Middle District of Florida,

CHARLES COTTONE
and
JOSEPH ROBERT COTTONE,

knowingly did make or cause to be made a materially false statement in an application for a loan submitted by

CHARLES COTTONE on said date to The Exchange National Bank of Tampa, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that CHARLES COTTONE stated and represented in said application that the proceeds of said loan were to be used to purchase feed for cattle when in truth and fact as CHARLES COTTONE well knew the proceeds of said loan were not to be so used; in violation of Title 18, United States Code, Sections 1014 and 2.

A TRUE BILL,

_____
FOREMAN

JOHN L. BRIGGS
United States Attorney
By: _____
JUDY A. SCHROPP
Assistant United States Attorney

APPENDIX "D"

UCC 250 NO. 18125 REORDER FROM — FORE LINE SYSTEMS, BOX 10463, TAMPA, FLA.
SA-FP

Contract No.

SECURITY AGREEMENT
(FARM PRODUCTS)

THIS AGREEMENT made January 23, 19 73, by and between

THE EXCHANGE NATIONAL BANK OF TAMPA, a corporation created and existing under the National Banking Laws of the United States of America, with its principal place of business in Tampa, Florida,

herein called "Bank", and

CHARLES COTTONE
(Name(s) of Borrower(s))

of Rt. 1, Box 117B (No. and Street) Morriston (City) Levy (County) Florida (State)

herein called "Borrower".

In consideration of loans or advances made or to be made by Bank to Borrower, and for other value received by Borrower, the parties hereto, intending to be legally bound, agree as follows:

1. As used herein: (a) "Borrower" includes all corporations and all individuals executing this agreement as parties hereto, and all members of a partnership, when Borrower is a partnership, each of whom shall be jointly and severally liable individually and as partners hereunder; (b) "Security interest" means an interest in property which secures payment or performance of an obligation; and (c) "Liability" or "liabilities" includes all loans and advances made hereunder by Bank to Borrower, and all liabilities (primary, secondary, direct, contingent, sole, joint or several) due or to become due or that may be hereafter contracted or acquired, of Borrower (including any Borrower and any other person) to Bank.

2. On the security of the Collateral hereinafter described or referred to, Bank (a) is contemporaneously herewith lending to Borrower a sum of money specified in a promissory note of even date herewith, executed and delivered by Borrower to Bank, payable as to principal and interest as therein provided, or (b) will from time to time hereafter lend Borrower such amounts as Bank may determine from time to time, at such rates of interest and payable on such terms as Bank may from time to time specify or require, and Bank may require that such loans, or any of them, be evidenced by promissory note or notes of the Borrower in form satisfactory to Bank; or (c) both is now lending and will hereafter lend to Borrower as mentioned in the foregoing (a) and (b). For the convenience of the Borrower, the Bank may make loan advances to the Borrower under any promissory note the principal face amount of which is in excess of the actual unpaid principal balance at such time.

3. As security for the payment of all loans and advances now or in the future made hereunder and for all Borrower's liabilities, including any extensions, renewals or changes in form of any thereof, and as security for performance by Borrower of the agreements herein set forth, Borrower hereby assigns to Bank and grants to Bank a security interest in the following goods:

(a) CROPS: All of the following crops planted or growing, or to be planted or growing within seven years from the date hereof, on the lands hereinafter described:

(b) LIVESTOCK: All livestock including but not limited to cross-bred commercial beef cattle with ear tag marked "Cottone", and all progeny, offspring, or increase thereof, and all replacements, additions, and increase thereto, or otherwise acquired by Debtor.

(c) All property similar to that described or referred to in "(a)", "(b)", and "(c)", above, which at any time may hereafter be acquired by Borrower including, but not limited to, additions and replacements and progeny of livestock and animals and poultry, and all products of all such property and of the crops described or referred to in "(a)" above.

(d) All proceeds of the sale or other disposition of any of the property described or referred to in "(a)" to "(d)", inclusive, above (all of which goods and property described or referred to in "(a)" to "(d)", inclusive, above, and the proceeds referred to herein, are in this agreement called "Collateral").

4. Borrower warrants that: (a) Borrower is the owner of the Collateral clear of all liens and security interests except the security interest granted hereby; (b) Borrower has the right to make this agreement; (c) all of the Collateral is or will become located or grown on the land (the farm, grove, or other farming

[the location on which is operated by Borrower] in the County of _____, State of _____, more particularly described as:

(If insufficient space, attach exhibit setting out complete description)

of which he is owner or tenant of said lands is or are:

(d) Borrower's residence if not the land described above is at the address specified in the preamble to this agreement, unless a different address has been specified in the following space:

(No. and Street) (City) (County) (State)

and (f) if the following is checked [ ] some or all of the Collateral is being acquired by Borrower with the proceeds, or some part of the proceeds, of the loan made hereunder, and Borrower hereby authorizes Bank to disburse said proceeds to the seller of such Collateral or to the insurance agent or broker, or both, as shown on Bank's records.

2. Borrower further agrees that:

(a) Borrower will pay the Bank all liabilities (including, but without limitation, all amounts of principal, interest, and other sums payable under or by virtue of any promissory note or other writing evidencing any liability, and all parts and installments thereof) as and when the same shall be due and payable, whether at maturity, by acceleration or otherwise, and will perform all terms of all promissory notes and other writings evidencing the liabilities, and each of them, and all terms of this and any other security or loan agreement between Borrower and Bank, and will discharge all said liabilities.

(b) Borrower will defend the Collateral against the claims and demands of all persons.

(c) Borrower will insure the Collateral against all hazards requested by Bank in form and amount satisfactory to Bank. If Borrower fails to obtain such insurance, Bank shall have the right to obtain it at Borrower's expense. Borrower hereby assigns to Bank all rights to receive proceeds of insurance and directs any insurer to pay all proceeds directly to Bank, and authorizes Bank to indorse any draft for the proceeds.

(d) Borrower will keep the Collateral in good condition and in an unmanufactured state, attend to and care for the Collateral, do all other acts which may be necessary to raise and fatten livestock and to plow, cultivate, spray, fertilize, irrigate, cut, harvest, pick, clean, preserve and protect the crops and farm products, all according to the most approved methods of farming and husbandry; prepare the Collateral for market and when it is ready for market promptly notify Bank of such fact; follow Bank's instructions, if any, with reference to holding, shipping, storing and marketing the Collateral (but Bank shall not be obligated to give any such instructions); maintain all buildings and improvements on said land in good condition and repair; give Bank prompt notice of any damage to the Collateral, or any part thereof, or to said land or to the farming or other operations operated thereon, and permit Bank to enter upon said lands at all reasonable times for the purpose of examining the Collateral and the land, buildings and improvements.

(e) Borrower will promptly upon request of Bank join with Bank in executing one or more financing statements, notices, affidavits, or similar instruments in form satisfactory to Bank, and such other instruments as Bank may from time to time request, and pay the cost of filing the same in any public office deemed advisable by Bank.

(f) Borrower will pay and discharge when due all taxes, levies and other charges on the Collateral and on said land and on account of or in connection with its liabilities and notes evidencing the same, and on account of or in connection with this agreement, including documentary tax stamps.

(g) Borrower will pay as part of its liabilities secured hereby, all amounts of costs and expenses, including attorneys' fees, with interest thereon, that is incurred by Bank (i) for taxes, levies, insurance, repairs to or maintenance of the Collateral and for any other taxes or levies required hereunder to be paid by the Borrower, and (ii) in taking possession of, disposing of or preserving the Collateral after any default hereinafter described.

3. Borrower will not permit any of the Collateral to be removed from the above-mentioned location without the prior written consent of the Bank, except for sale in the ordinary course of Borrower's farming operations.

(i) Borrower will immediately advise Bank in writing of any change in the Borrower's residence.

5. Borrower will not (a) permit any liens or security interests (other than Bank's security interest) to attach to any of the Collateral, nor permit any financing statement (except Banks' financing statement) to be on file with respect thereto; (b) permit any of the Collateral to be levied upon under any legal process; (c) dispose of any of the Collateral without the prior written consent of Bank, except by sale in ordinary course of Borrower's farming operations; (d) permit anything to be done that may impair the value of any of the Collateral or the security intended to be afforded by this agreement.

7. Bank is hereby appointed Borrower's attorney-in-fact to do all acts and things which Bank may deem necessary to perfect and continue perfected the security interest created by this agreement and to protect the Collateral, but Bank shall not be obligated to do any thereof.

8. Borrower shall pay Bank such interest as may be specified in any note evidencing a loan or advance made hereunder and such service charges as may be agreed upon and shall pay to Bank all costs and expenses, including attorneys' fees, incurred by it in the preservation or collection of Collateral. Changes in interest rate and service charges may be made by Bank from time to time, notwithstanding the interest rate specified in any note evidencing a loan or advance hereunder, upon notice to Borrower and shall become effective on the date therein specified.

9. Until default, Borrower may retain possession of the Collateral and harvest, pick, process, store and use it in any lawful manner not inconsistent with the agreements herein or with the terms and conditions of any policy of insurance thereon; and may use and consume any hay, grain, food, forage, fodder, or crops covered hereby in preserving and preparing for market any livestock or poultry in which Bank has a security interest.

10. If at any time any warranty, representation, certificate or statement of Borrower is not true, or if any liability or any part of installment thereof or interest thereon is not paid when due, or if any event of default as defined in any note or other evidence of liability held by Bank should occur, or if Borrower should fail to observe or perform any agreement or term he-eof, or if Bank at any time feels insecure for any reason whatsoever, Bank may, at its option, thereupon or thereafter declare all liabilities of Borrower to Bank, or any of them selected by Bank (notwithstanding any provisions thereof), immediately due and payable without demand or notice of any kind (but with such adjustments, if any, with respect to any interest or other charges as may be provided for in the promissory note or other writing evidencing such liability), and Bank in addition to any other rights and remedies which it may have, shall have and may exercise immediately and without demand, any and all the rights and remedies granted to a secured party upon default under the Uniform Commercial Code, and under other applicable law and all rights provided herein, in any note or other writing evidencing any liability, and in any other applicable instrument or loan agreement, all of which rights and remedies shall, to the full extent permitted by law, be cumulative including, without limiting the generality of the foregoing, the right to take possession of the Collateral or any part thereof, to perform all of the operations which Borrower has agreed to perform hereunder and to take such other measures as Bank may deem necessary for the care, growing, harvesting, picking, protection, preservation, and marketing of the Collateral.

11. Upon request or demand of Bank, Borrower shall, at its expense, assemble the Collateral and make it available to Bank at a convenient place acceptable to Bank. Borrower shall pay to Bank on demand any and all expenses, including legal expenses and reasonable attorneys' fees incurred or paid by Bank in protecting the enforcing liabilities and the rights of Bank hereunder, including Bank's right to take possession of the Collateral and its proceeds. Any failure of Bank to take possession or other intended action by Bank, sent to Borrower at the address specified above, or such other address of Borrower as may from time to time be known on Bank's records, at least five days prior to such action, shall constitute reasonable notice to Borrower. The proceeds of any disposition of the Collateral, or any part thereof, may be applied by the Bank to the payment of any liabilities whether or not they, or any of them, be then due, and in such order of application as Bank may from time to time elect.

12. No waiver by Bank of any default shall operate as a waiver of any other default or of the same default on future occasion. No delay or omission on the part of Bank in exercising any right or remedy shall operate as a waiver thereof, and no single or partial exercise by Bank of any right or remedy shall preclude or impair any other or further exercise thereof or the exercise of any other right or remedy. Time is of the essence of this agreement. The provisions of this agreement are cumulative and in addition to the provisions of any liability and any note or other writing evidencing any liability secured by this agreement, and Bank shall have all the benefits, rights and remedies of and under any liability and any note or other writing evidencing any liability secured hereby. If more than one party shall execute this agreement, the term "Borrower" shall mean all parties signing this agreement and each of them, and all such parties shall be jointly and severally obligated and liable hereunder. The singular pronoun, when used herein, shall include the plural, and the neuter shall include the masculine and feminine. All rights of the Bank hereunder shall inure to the benefit of its successors and assigns; and all obligations of Borrower shall bind the heirs, executors, administrators, successors and assigns of each Borrower. If this agreement is not dated when executed by the Borrower, the Bank is authorized, without notice to the Borrower, to date this agreement.

13. This agreement may be terminated by either party giving the other written notice of intention to terminate on a date named in said notice, mailed or delivered to the address shown in the preamble of this agreement or to the last known address of the Borrower or other party to whom such notice is addressed, known on the records of the Bank or otherwise known, but no such termination shall in any way affect the rights and liabilities of the parties hereto with respect to loans made and Collateral pledged prior to the date named in such notice.

14. This agreement has been delivered in the State of Florida and shall be construed in accordance with the laws of Florida.

IN WITNESS WHEREOF, this agreement has been duly executed as of the date hereinabove first written.

Signed, sealed and delivered
in the presence of:

Charles Cottone (SEAL)

(SEAL)

(SEAL)
BORROWER

THE EXCHANGE NATIONAL BANK OF TAMPA

By Robert Wilson Vice President
As its

BANK

APPENDIX "E"

AGR 8% payable quarterly beginning April 15, 1973

$ 50,000.00 Tampa, Florida January 23, 19 73 Note No. 85689

On Demand but not later than
October 15, 1973 after date the undersigned (and if more than one, each of them jointly and severally), hereinafter called Maker, promises to pay to the order of THE EXCHANGE NATIONAL BANK OF TAMPA, hereinafter called Bank, at its office at Tampa, Florida, the principal sum of ---Fifty Thousand and no/100---------- Dollars with interest thereon from date hereof at the rate of 8% per annum until maturity, and at ten percent per annum thereafter until paid. The Maker shall have the privilege and option, at any time, to pay off the entire principal remaining unpaid, or any part thereof, together with interest thereon to date of payment only. As security for the payment of this note Maker hereby pledges to Bank the following property:

Security Agreement on livestock

and all other property of Maker now or hereafter delivered to or left in or coming into the possession, control or custody of Bank, whether expressly as Collateral security or for any other purpose (including all cash, stock and other dividends and all rights to subscribe for securities incident to, declared, or granted in connection with such property), which property, together with all additions and substitutions, is called the Collateral. The Collateral is also pledged as security for all other liabilities (primary, secondary, direct, contingent, sole, joint or several), due or to become due or which may be hereafter contracted or acquired, of each Maker (including each Maker and any other person) to Bank, whether such liabilities arise in the ordinary course of business or not. Right is hereby expressly granted to the Bank at its option to transfer at any time to itself or to its nominee any Collateral and to receive the income thereon and hold the same as security herefor, or apply it on the principal or interest due hereon or due on any liability secured hereby. The surrender of this note, upon payment or otherwise, shall not affect the right of Bank to retain the Collateral for such other liabilities.

It is jointly and severally covenanted and agreed with the Bank by each Maker, endorser, surety, guarantor, and other party to this note (all of whom are hereinafter for brevity called Obligor or Obligors) that:

Additions to, releases, reductions or exchanges of, or substitutions for the Collateral, payments on account of this loan or increases of the same, or other loans made partially or wholly upon the Collateral, may from time to time be made without affecting the provisions of this note or the liabilities of any party hereto. Bank shall exercise reasonable care in the custody and preservation of the Collateral, and shall be deemed to have exercised reasonable care if it takes such action for that purpose as Maker shall reasonably request in writing, but no omission to comply with any request of Maker shall of itself be deemed a failure to exercise reasonable care. Bank shall not be bound to take any steps necessary to preserve any rights in the Collateral against prior parties, and Maker shall take all necessary steps for such purposes. Bank or its nominee need not collect interest on or principal of any Collateral or give any notice with respect to it.

If the Collateral shall at any time become unsatisfactory to Bank, or if the Bank shall at any time deem itself insecure, Maker shall within one day after demand deposit with Bank as part of the Collateral additional property which is satisfactory to Bank.

Upon the happening of any of the following events, each of which shall constitute a default hereunder, all liabilities of each Maker to Bank shall thereupon or thereafter, at the option of Bank, without notice or demand, become due and payable: (a) failure of any Obligor to perform any agreement hereunder or to pay in full, when due, any liability whatsoever to Bank or any instalment thereof or interest thereon, or failure to pay when due any premium on any life insurance policy held as collateral hereunder; (b) the death of any Obligor; (c) the filing of any petition under the Bankruptcy Act, or any similar federal or state statute, by or against any Obligor; (d) an application for the appointment of a receiver for, the making of a general assignment for the benefit of creditors by, or the insolvency of any Obligor; (e) the entry of a judgment against any Obligor; (f) the issuing of any attachments or garnishment, or the filing of any lien, against any property of any Obligor; (g) the taking of possession of any substantial part of the property of any Obligor at the instance of any governmental authority; (h) the dissolution, merger, consolidation, or reorganization of any Obligor; (i) the determination by an officer of Bank that a material adverse change has occurred in the financial condition of any Obligor from the conditions set forth in the most recent financial statement of such Obligor heretofore furnished to Bank, or from the condition of such Obligor as heretofore most recently disclosed to Bank in any manner; or that any warranty, representation, certificate, or statement of any obligor (whether contained in this note or not) pertaining to or in connection with this note or the loan evidenced by this note is not true; (j) the assignment by any Maker of any equity in any of the Collateral without the written consent of Bank.

Bank shall have, but shall not be limited to, the following rights, each of which may be exercised at any time whether or not this note is due: (i) to pledge or transfer this note and the Collateral, whereupon Bank shall be relieved of all duties and responsibilities hereunder and relieved from any and all liability with respect to any Collateral so pledged or transferred, and any pledgee or transferee shall for all purposes stand in the place of Bank, and have all the rights of Bank hereunder; (ii) to transfer the whole or any part of the Collateral into the name of itself or its nominee; (iii) to vote the Collateral; (iv) to notify the obligors on any Collateral to make payment to Bank of any amounts due or to become due thereon; (v) to demand, sue for, collect, or make any compromise or settlement it deems desirable with reference to the Collateral; and (vi) to take possession or control of any proceeds of Collateral.

Bank is hereby given a lien upon and a security interest in all property of each Obligor now or at any time hereafter in the possession of Bank in any capacity whatsoever, including but not limited to any balance or share of any deposit, trust, or agency account, as security for the payment of this note, and a similar lien upon and security interest in all such property of each Maker as security for the payment of all other liabilities of each Maker to Bank, and Bank shall have the same rights as to such property as it has with respect to the Collateral.

If Bank deems itself insecure or upon the occurrence of any default hereunder Bank shall have all the remedies of a secured party under the Uniform Commercial Code for the State of Florida and, without limiting the generality of the foregoing, Bank shall have the right, at its option, and without notice or demand, to declare the entire amount of this note remaining unpaid, and all other liabilities of any obligor or any of such liabilities selected by Bank, immediately due and payable, less any unearned interest or other charges and any rebates required by law (it being the intention hereof that under no circumstances shall Bank or any holder hereof be entitled to receive at any time any charges not allowed or permitted by law or any interest in excess of the maximum allowed by law); to set off against this note all money owed by Bank in any capacity to each or any Obligor, whether or not due, and also to set off against all other liabilities of each Maker to Bank all money owed by Bank in any capacity to each or any Maker; and Bank shall be deemed to have exercised such right of set off and to have made a charge against any such money immediately upon the occurrence of such default even though such charge is made or entered on the books of Bank subsequent thereto. Unless the Collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Bank will give Maker reasonable notice of the time and place of any public or private sale thereof. The requirement of reasonable notice shall be met if such notice is mailed, postage prepaid, to any Maker at the address given below or at any other address shown on the records of the Bank, at least ten days before the time of sale or disposition. Upon disposition of any Collateral after the occurrence of any default hereunder, Maker shall be and remain liable for any deficiency and Bank shall account to Maker for any surplus, but Bank shall have the right to apply all or any part of such surplus (or to hold the same as a reserve) against any and all other liabilities of each or any Maker to Bank.

No delay or omission on the part of Bank in exercising any right hereunder shall operate as a waiver of such right or of any other right under this note. Presentment, demand, protest and notice of dishonor, are hereby waived by each and every Obligor. The Obligors, jointly and severally, promise and agree to pay all costs of collection and reasonable attorney's fees incurred or paid by Bank in enforcing this note upon the occurrence of any default. Any notice to Maker shall be sufficiently served for all purposes if placed in the mail, postage prepaid, addressed to, or left upon the premises of, the address shown below or any other address shown on Bank's records.

Each Obligor hereby expressly consents to any and all extensions and renewals, in whole or in part, and all delays in time of payment or other performance which the holder hereof may grant or permit at any time and from time to time without limitation and without any notice to or further consent of any Obligor.

ADDRESS Rt. 1, Box 177B
Norriston, Fla. 32668

Charles Cottone (SEAL)
Charles Cottone

(SEAL)

In addition to the liability as indorsers, which the undersigned hereby assume, for value received and intending to be legally bound, the undersigned (and if more than one, each of them jointly and severally) (a) hereby become surety to the payee of the within note, its successors, indorsees and assigns, for the payment of the within note, and hereby unconditionally guarantee the payment of the within note and all extensions or renewals thereof and all sums payable under or by virtue thereof including, without limitation, all amounts of principal and interest and all expenses (including attorney's fees) incurred in the collection thereof, the enforcement of rights thereunder or with respect to any security therefor and the enforcement hereof, and waive presentment, demand, notice of dishonor, protest and all other notices whatsoever; and (b) consent and agree that they are bound as Obligors under the terms of and are subject to all provisions set forth on the face of said note as fully as though they were such a Maker thereof, and to the exercise by the holder of each and every right therein set forth or permitted by law all without notice to or consent of said undersigned affecting the liability of the undersigned as indorsers and sureties, and further consent and agree that any of the undersigned may be sued by the holder hereof with or without joining any of the other indorsers or makers of said note and without first or contemporaneously suing any such other persons, or otherwise seeking or proceeding to collect from them or any of them.

Joseph Cottone (SEAL)

(SEAL)

(SEAL)

R.

Pay to the order of Joseph Cottone and Mary E. Cottone without recourse.

THE EXCHANGE NATIONAL BANK OF TAMPA

By: Robert W. Harris
Vice President